A

# SMALL MEDIUM ENTERPRISE DEVELOPMENT BANK MALAYSIA BHD v. BLACKROCK CORPORATION SDN BHD & ORS

B

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: B-02(IM)(NCVC)-1488-09-2015]
28 JANUARY 2017

C

***CIVIL PROCEDURE:*** *Action – Multiplicity of actions – Whether factual matrix of present action same as previous action – Whether matter adjudged and litigated – Whether created an estoppel per rem judicature – Whether provides finality in litigation – Whether present action abuse of court's process*

D

***CIVIL PROCEDURE:*** *Affidavit – Wound up company – Powers to institute legal proceedings – Action commenced by directors of company – Whether directors of wound up company have limited residual powers – Whether power to institute legal proceedings vested in liquidator – Whether only liquidator has capacity to depose affidavit for and on behalf of company – Whether affidavits deposed by wound up company defective – Companies Act 1965, s. 236*

E

***CIVIL PROCEDURE:*** *Striking out – Locus standi – Wound up company – Whether has locus standi to institute action – Sanction obtained post filing of writ and statement of claim – Whether sanction is to have retrospective effect – Whether power to institute legal proceedings vested in liquidator – Filing of counterclaim after being served with bankruptcy notice – Whether action frivolous and an abuse of court's process – Rules of Court 2012, O. 18 r. 19(1)*

F

The first plaintiff, the main contractor for a project in Johor Bahru, obtained banking facilities from the defendant and as a security executed (i) facility agreement; and (ii) deed of assignment of contract proceeds ('deed of assignment'). At the same time, a joint and several guarantee and indemnity was provided by the second to fourth plaintiffs. Pursuant to the banking facilities, the first plaintiff applied to the defendant to pay its sub-contractor the sum of RM250,000 directly. However, the defendant failed to do so, resulting in the first plaintiff being wound up by the sub-contractor pursuant to a winding-up petition. Consequently, the first plaintiff was terminated as the main contractor for the project. The defendant terminated the banking facilities granted to the first plaintiff and proceeded to commence a suit against the second to fourth plaintiffs ('the guarantee action'). After a full trial, judgment was entered in favour of the defendant and following thereto, the defendant filed bankruptcy proceedings against the second to fourth

G

H

I

plaintiffs. On 15 April 2014, the plaintiffs filed a suit against the defendant ('suit 207'). A notice of application to strike out the said suit was filed by the defendant under O. 18 r. 19(1) of the Rules of Court 2012 on grounds that (i) the first plaintiff, being a wound up company, did not have the *locus standi* to institute suit 207; and (ii) the plaintiffs were estopped from pursuing suit 207 by reason of *res judicata*/absolute estoppel. The plaintiffs obtained the sanction from the official receiver to proceed with suit 207 on 3 June 2015. The defendant's notice of application to strike out was dismissed by the High Court and hence, this appeal.

**Held (allowing appeal with costs)**
**Per Zabariah Mohd Yusof JCA delivering the judgment of the court:**

**(1)** It is not as a matter of right that sanction is to have retrospective effect. When the writ and the statement of claim was filed in suit 207, there was no sanction obtained by the first plaintiff. Sanction was only obtained post-filing of the writ and statement of claim. Further, in suit 207, it was the liquidator who must initiate the action and not the directors. As the first plaintiff had no capacity to institute the action from the beginning, there cannot be a retrospective sanction. (paras 26-29)

**(2)** The second to fourth plaintiffs instituted the action in their capacity as directors of the first plaintiff. However, as the first plaintiff had been wound up, the second to fourth plaintiffs, being directors, had limited residual powers. The powers to conduct the affairs of the wound up company, including the power to institute legal proceedings, is vested in the liquidator. Hence, the affidavits deposed by the first plaintiff in reply to the notice of application in the striking out in suit 207 were also defective, as only the liquidator had the capacity to depose the affidavit for and on behalf of the first plaintiff which had been wound up as stipulated under s. 236(2) of the Companies Act 1965. (paras 30 & 31)

**(3)** Section 74 of the Contracts Act 1950 envisages compensation for loss or damage caused by the breach of contract entered into between the parties. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. The reliefs prayed for by the second to fourth plaintiffs were for their losses in their personal capacities. The second to fourth plaintiffs were never parties to the facility agreement and hence, could not have incurred any loss or damage as averred in their statement of claim. (para 32)

**(4)** Further, the reliefs sought by the second to fourth plaintiffs were premised upon the fact that, since the first plaintiff was not liable, they could not be made liable. They were effectively seeking to extinguish the judgment obtained in the guarantee action. However, it was a fact that the said judgment was valid and was never set aside. The guarantee

action was decided after a full trial and hence, any dissatisfaction on the said judgment ought to have been brought up in an appeal. Parties cannot apply before another court of co-ordinate jurisdiction to set aside or 'extinguish' the said judgment, as the court was already *functus officio*, save and except on the issue of illegality or lack of jurisdiction. Clearly, the relief prayed for by the second to fourth plaintiffs was an abuse of the court's process. (para 33)

**(5)** The factual matrix of suit 207 and the guarantee action provided a plain and clear case of multiplicity of actions, which is an abuse of the court's process. A matter or issue which had been adjudged and litigated, created an estoppel *per rem judicature*. The effect is that the parties and their privies are not allowed to litigate again on the same matter as the judgment becomes the truth between the parties. The rationale is that it is in the public interest that there should be finality in litigation, and that, parties should not be vexed twice for the same causes of action. Nowhere in the judgment in suit 207 did the judge allude to the facts which could lead to an injustice to the parties if the doctrine was applied. Neither was it shown to the court that an unjust result would occur if and when *res judicata* was applied. (paras 41-43)

**(6)** The second to fourth plaintiffs commenced their action in the writ action and statement of claim in suit 207 only after the bankruptcy action was filed against them. Clearly, the plaintiffs' counterclaim was filed only after the bankruptcy notice was served. Raising it for the first time in suit 207, and only after the bankruptcy notice was served on the plaintiffs, clearly smacked of *mala fides* and making use of the court process to justify their means to an end. Suit 207 was thus frivolous and an abuse of the court's process and was therefore unsustainable and ought to be struck out. (paras 46, 47 & 50)

***Bahasa Malaysia** Headnotes*

Plaintif pertama, kontraktor utama bagi sebuah projek di Johor Bahru, memperoleh kemudahan perbankan daripada defendan dan sebagai jaminan memeterai (i) perjanjian kemudahan; dan (ii) surat ikatan penyerahhakan hasil kontrak ('surat ikatan penyerahhakan'). Pada masa yang sama, jaminan dan indemniti bersama dan berasingan diberi oleh plaintif kedua hingga keempat. Berikutan kemudahan perbankan tersebut, plaintif pertama memohon pada defendan untuk membayar terus kepada sub-kontraktornya sejumlah RM250,000. Walau bagaimanapun, defendan gagal membuat bayaran tersebut, mengakibatkan plaintif pertama digulung oleh sub-kontraktor menurut satu petisyen penggulungan. Berikutan itu, plaintif pertama ditamatkan sebagai kontraktor utama bagi projek tersebut. Defendan membatalkan kemudahan perbankan yang diberikan kepada plaintif pertama dan meneruskan untuk memulakan tindakan terhadap plaintif kedua hingga

keempat ('tindakan jaminan'). Selepas perbicaraan penuh, penghakiman dimasukkan berpihak pada defendan dan berikutan itu, defendan memfailkan prosiding kebankrapan terhadap plaintif kedua hingga keempat. Pada 15 April 2014, plaintif-plaintif memfailkan guaman terhadap defendan ('guaman 207'). Satu notis permohonan untuk membatalkan, difailkan oleh defendan bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah 2012 atas alasan-alasan bahawa: (i) plaintif pertama, sebagai syarikat yang telah digulung, tiada *locus standi* untuk memulakan guaman 207; dan (ii) plaintif-plaintif diestop daripada meneruskan guaman 207 atas alasan *res judicata*/estoppel mutlak. Plaintif-plaintif memperoleh sanksi daripada pegawai penerima untuk meneruskan dengan guaman 207 pada 3 Jun 2015. Notis permohonan untuk pembatalan oleh defendan ditolak Mahkamah Tinggi dan dengan itu, rayuan ini.

**Diputuskan (membenarkan rayuan dengan kos)**

**Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:**

**(1)** Sanksi tidak mempunyai kesan retrospektif secara terus. Apabila writ dan penyataan tuntutan difailkan dalam guaman 207, sanksi belum diperoleh plaintif pertama. Sanksi hanya diperoleh selepas pemfailan writ dan penyataan tuntutan. Selanjutnya, dalam guaman 207, pelikuidasi yang sepatutnya memulakan tindakan dan bukan pengarah-pengarah. Oleh sebab plaintif pertama tiada kuasa memulakan tindakan dari awal lagi, tidak boleh ada sanksi secara retrospektif.

**(2)** Plaintif kedua hingga keempat memulakan tindakan tersebut dalam kuasa mereka sebagai pengarah-pengarah plaintif pertama. Walau bagaimanapun, oleh sebab plaintif pertama telah digulung, plaintif kedua hingga keempat, sebagai pengarah-pengarah, mempunyai kuasa berbaki yang terhad. Kuasa melaksanakan urusan syarikat yang telah digulung, termasuk kuasa untuk memulakan prosiding perundangan, terletak hak pada pelikuidasi. Oleh itu, afidavit-afidavit yang dibuat oleh plaintif pertama sebagai jawapan kepada notis permohonan pembatalan dalam guaman 207 juga cacat, kerana hanya pelikuidasi yang mempunyai kuasa membuat afidavit untuk dan bagi pihak plaintif pertama yang telah digulungkan seperti yang dinyatakan bawah s. 236(2) Akta Syarikat 1965.

**(3)** Seksyen 74 Akta Kontrak 1950 membayangkan pampasan bagi kehilangan atau kerugian akibat kemungkiran kontrak yang dimasuki antara pihak-pihak. Pampasan sebegitu bukan untuk diberikan bagi kehilangan atau kerugian yang tidak berkaitan atau tidak langsung akibat kemungkiran tersebut. Relif-relif yang dipohon oleh plaintif kedua hingga keempat adalah untuk kerugian mereka dalam kuasa peribadi mereka. Plaintif kedua hingga keempat tidak pernah menjadi pihak pada

perjanjian kemudahan tersebut, dan dengan itu, tidak mungkin mengalami kehilangan atau kerugian seperti yang dinyatakan dalam penyataan tuntutan mereka.

**(4)** Selanjutnya, relif yang dipohon plaintif kedua hingga keempat berasaskan fakta bahawa, oleh sebab plaintif pertama tidak bertanggungan, mereka juga tidak bertanggungan. Secara efektifnya, mereka memohon untuk melupuskan penghakiman yang diperoleh dalam tindakan jaminan. Walau bagaimanapun, fakta adalah bahawa penghakiman tersebut sah dan tidak pernah diketepikan. Tindakan jaminan diputuskan selepas perbicaraan penuh dan dengan itu, apa-apa ketidakpuasan hati terhadap penghakiman tersebut wajar dibawa dalam rayuan. Pihak-pihak tidak boleh memohon pada mahkamah dengan bidang kuasa sama untuk mengetepikan atau 'melupuskan' penghakiman tersebut, kerana mahkamah telah pun *functus officio*, kecuali berkaitan isu ketaksahan atau ketiadaan bidang kuasa. Jelas, relif yang dipohon plaintif kedua hingga keempat adalah penyalahgunaan proses mahkamah.

**(5)** Matriks fakta guaman 207 dan tindakan jaminan menunjukkan kes jelas tindakan berganda adalah penyalahgunaan proses mahkamah. Perkara atau isu yang telah dihakimi dan dilitigasi, membentuk estoppel *per rem judicature*. Kesannya adalah pihak-pihak atau sesiapa yang memihak pada mereka tidak dibenarkan melitigasi semula atas perkara yang sama kerana penghakiman tersebut menjadi perkara sebenar antara pihak-pihak. Rasionalnya, adalah dalam kepentingan awam litigasi perlu dimuktamadkan dan pihak-pihak tidak wajar disakiti dua kali bagi kausa tindakan yang sama. Tidak dinyatakan dalam mana-mana bahagian penghakiman guaman 207 hakim menyetujui fakta yang boleh menjurus pada ketidakadilan pada pihak-pihak jika doktrin tersebut digunakan. Juga, tidak ditunjukkan pada mahkamah bahawa keputusan tidak adil akan dibuat jika dan apabila *res judicata* dipakai.

**(6)** Plaintif kedua hingga keempat memulakan tindakan mereka dalam tindakan writ dan penyataan tuntutan dalam guaman 207 hanya selepas tindakan kebankrapan difailkan terhadap mereka. Jelas, tuntutan balas plaintif-plaintif difailkan hanya selepas notis kebankrapan diserahkan. Membangkitkannya bagi pertama kali dalam guaman 207, dan hanya selepas notis kebankrapan diserahkan kepada plaintif-plaintif, jelas adalah *mala fide* dan mereka telah menyalahgunakan proses mahkamah untuk menjustifikasi tujuan mereka. Oleh itu, guaman 207 adalah remeh dan penyalahgunaan proses mahkamah dan dengan itu, tidak boleh dikekalkan dan wajar dibatalkan.

**Case(s) referred to:**

*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***
*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***
*Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA* ***(refd)***
*Datuk Eric Taylor v. Lim Foo Yong & Sons Realty Sdn Bhd [1990] 1 CLJ 415; [1990] 1 CLJ (Rep) 86 SC* ***(refd)***
*Datuk Ooi Han Eng & Anor v. Soh Huang Siah [2010] 1 LNS 343 CA* ***(refd)***
*Gleeson v. J Wippel & Co Ltd [1977] 3 All ER 54* ***(refd)***
*Henderson v. Henderson (1843) 3 Hare 100* ***(refd)***
*Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA* ***(dist)***
*Joseph Paulus Lantip & Ors v. Unilever PLC [2012] 7 CLJ 693 FC* ***(refd)***
*Penang Port Commission v. Kanawagi Seperumaniam [2009] 1 CLJ 169 CA* ***(refd)***
*Re Bearman (A Bankrupt), Re Bristol & West Building Society v. Saunders [1977] Ch 60* ***(refd)***
*Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413* ***(refd)***
*Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC* ***(refd)***
*Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC* ***(refd)***
*Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd [2014] 2 CLJ 1 FC* ***(dist)***
*Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC* ***(foll)***

**Legislation referred to:**

Companies Act 1965, ss. 226(3), 233, 236(2)(a), (3)
Contracts Act 1950, s. 74
Rules of Court 2012, O. 18 r. 19(1)(b), (c), (d)

*For the appellant - Nor Shadah Shaari; M/s Shukor Baljit & Partners*
*For the respondents - Abdul Rashid Ismail & Thulasy Suppiah; M/s Rashid Zulkifli*

*[Editor's note: For the High Court judgment, please see Blackrock Corporation Sdn Bhd & Ors v. Small Medium Enterprise Development Bank Malaysia Berhad [2015] 1 LNS 853 (overruled).]*

*Reported by S Barathi*

## JUDGMENT

**Zabariah Mohd Yusof JCA:**

**[1]** This is an appeal by the defendant, who is the appellant here, against the decision of the learned High Court Judge who had dismissed the notice of application by the defendant to strike out the plaintiffs' (who are the respondents here) writ and statement of claim dated 15 April 2015 pursuant to O 18 r. 19(1)(b), (c) and/or (d) of the Rules of Court 2012.

Parties will be referred to, as they were in the court below.

**[2]** After hearing submissions from both parties, we allowed the appeal with costs. Hereinbelow are our grounds.

A **Background**

**[3]** The first plaintiff was appointed as the main contractor for Pembinaan BLT Sdn Bhd for the construction and completion of a Royal Marine base at Tanjung Pelepas, Johor Bahru, Johor for a contract sum of RM125 million (hereinafter referred to as "the project") .

B

**[4]** To undertake the construction of the project, the first plaintiff obtained banking facilities from the defendant. As security, the first plaintiff executed the following documents:

(i) facility agreement dated 6 September 2007;

C

(ii) deed of assignment of contract proceeds dated 6 September 2007 (deed of assignment).

**[5]** At the same time, a joint and several guarantee and indemnity dated 6 September 2007 was provided by the second to fourth plaintiffs

D (guarantee).

**[6]** Pursuant to the banking facilities, on 20 October 2009, the first plaintiff applied to the defendant to pay the first plaintiff's sub-contractor, Forest Point Sdn Bhd the sum of RM250,000 directly.

E **[7]** However, the defendant failed to pay Forest Point Sdn Bhd as directed. The reason being, due to a disputed deduction of legal fees which were incurred by the defendant as a result of an earlier civil litigation which involved the first plaintiff, second plaintiff and the defendant against Asian Minerals & Ores Pte Ltd.

F **[8]** Due to the non-payment, the first plaintiff was wound up by Forest Point Sdn Bhd pursuant to Shah Alam High Court Winding Up Petition No. 28-323-2010.

**[9]** Consequently, Pembinaan BLT Sdn Bhd terminated the first plaintiff as the main contractor for the project.

G **[10]** At the same time, the defendant also terminated the banking facilities which were granted to the first plaintiff.

**[11]** Thereafter, the defendant commenced Civil Suit 22NCVC-915-2011, at the Shah Alam Court, against the second to fourth plaintiffs pursuant to

H the guarantee (hereinafter referred to as "the guarantee action"). There was a full trial in respect of the guarantee action and judgment was subsequently entered in favour of the defendant on 30 May 2014 by Yaacob bin Sam J. Following thereto, the defendant filed bankruptcy proceedings against the second to fourth plaintiffs. These bankruptcy proceedings are still ongoing.

I **[12]** The plaintiffs then filed a civil suit (22NCVC-207-2015) against the defendant on 15 April 2015, ie, the present civil suit (hereinafter referred to as "suit 207"). A notice of application to strike out under O. 18 r. 19(1) of

the Rules of Court 2012 was filed by the defendant, which is the subject of the present appeal before us. Sanction from the official receiver was obtained by the plaintiffs on 3 June 2015 to proceed with this civil suit.

*The Basis Of The Notice Of Application To Strike Out By The Defendant*

**[13]** The defendant premised its application for the striking out of suit 207 on the following grounds:

(i) that the first plaintiff, being a wound up company, does not have the capacity or the *locus standi* to institute suit 207; and

(ii) that the plaintiffs are estopped from pursuing suit 207 by reason of *res judicata*/absolute estoppel.

**[14]** The application by the defendant was opposed by the plaintiffs and they maintained that suit 207 was properly instituted and sanctioned by the official receiver and that *res judicata* was not applicable.

**Findings**

*Whether The First Plaintiff Has The Capacity And Locus Standi To Institute The Action*

**[15]** It was argued by the defendant that as the first plaintiff had been wound up on 23 February 2011 *vide* a Shah Alam Court Order in Suit No. 28-323-2010, sanction had to be obtained before the first plaintiff institutes suit 207 against the defendant. The facts showed that there was no prior sanction obtained by the first plaintiff from the official receiver before the filing of the said action. The entitlement of the first plaintiff in the writ and statement of claim as to its actual capacity and address of the receiving officer was not stated. To support its argument in this regard, the defendant relied on s. 236(2)(a) of the Companies Act 1965 which states:

> 236. Powers of liquidator
>
> (2) The liquidator may:
>
> (a) bring or defend any action or other legal proceeding in the name and on behalf of the company.

**[16]** The defendant also relied on the Court of Appeal case of *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88 where it had been held at pp. 93-94 as:

> [15] Section 236(2) of the Companies Act 1965 strengthens the position that only the official assignee as the appointed liquidator has the power to bring or defend any action or other legal proceedings in the name and on behalf of the wound-up company. If for whatever reason, the official assignee as the liquidator is unwilling to initiate the action in the name of the wound-up company, a creditor or a contributory can apply to the court under ss. 236(3) or 279 of the companies Act 1965 seeking an order that the liquidator be compelled to initiate the action in the name of the

wound-up company or that leave be given to the creditor or contributory himself to bring the action in the name of the company. (See *Abric Project Management Sdn Bhd v. Palmshire Plaza v. Boustead Eldred Sdn Bhd (supra)*). Again to do so, the creditor or the contributory must have obtained leave of the court before commencing the action in the name and on behalf of the wound up company.

[16] There is no evidence to show that the commencement of the present action by the appellant itself on 26 February 2009 was done with the knowledge and authority of the official assignee as the liquidator. Clearly, the appellant or its shareholders or directors cannot usurp the powers of the liquidator in initiating the present action against the respondent. The appellant cannot commence the action and then later after objections raised by the respondent, apply for leave or sanction from the Official Assignee. The authority given by the Official Assignee is dated 3 March 2011, more than 2 years and three months after action was filed in court. There are no provisions of law to authorise that leave or sanction of the official assignee is to have retrospective effect. The appellant lacks *locus standi* right from the time when the action was filed. Therefore the action was invalid and void *ab initio*. Subsequent leave or approval by the official assignee office which came more than two years later cannot legalise or validate an action which was invalid and void *ab initio*.

**[17]** Hence, the defendant submitted that, the sanction obtained on 3 June 2015 after the filing of the writ and the statement of claim in suit 207 dated 15 April 2015 was defective which rendered the writ and the statement of claim invalid and void *ab initio*.

**[18]** In opposing the application by the defendant, the first plaintiff relied on the Federal Court judgment in *Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd* [2014] 2 CLJ 1, where Mohamed Apandi Ali FCJ held at pp. 10-11:

[20] It was also argued by the applicant that by applying the doctrine of ratification, a subsequent sanction could only ratify the issue of *locus standi*. To see if such doctrine is applicable in this case, it is appropriate to see the actual "sanction" given. The sanction as per the Director General of Insolvency's letter dated 19th August 2013, did not specify that it is to be retrospective. For the doctrine of ratification to be applicable, the ratification must be clear. Furthermore, in the present case, there is no evidence to show that there is ever any application for the sanction to be retrospective. In *Re Saunders (A Bankrupt), Re Bearman (A Bankrupt), Re Bristol & West Building Society v. Saunders* [1977] Ch 60; [1977] 3 All ER 992. Lindsay J held:

> Given the practical inconveniences I have described the injustices that can be left without possible remedy if retrospective leave is in no case possible. I share with the Full bench in Lahore in 1942 the view that, if the section is capable of being read more than one way, there is no doubt which way entails the less injustice and inconvenience. If, as I hold, the words used are in their full

> historical context fairly capable of bearing more than one meaning, it is legitimate for me to adopt a meaning which gives effect to the statutory purpose, rather than frustrating it, as in my view an inflexible powerlessness to give leave even in the most glaring of cases would do …
>
> … Accordingly, I hold that leave may in appropriate circumstances be given under section 285(3), notwithstanding that the proceedings in question have already been commenced.
>
> ... As for the discretion, I have earlier mentioned that the trustees in bankruptcy do not oppose the granting of leave and that it has been conceded that if the jurisdiction exists the facts are such as to justify a grant of leave *nunc pro tunc* in exercise of the discretion. I am satisfied that that is so and grant such leave.
>
> [21] The issue of prejudice or miscarriage of justice does not arise in the circumstances, as the applicant, on its own accord, had failed to utilise the enabling provisions of the law to commence the impugned legal proceedings. The court, in law, is not in a position to render assistance to such litigant.
>
> [22] Following *Saunders*' case, we hold the view that in appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s. 236(a) of the Companies Act subject to the discretion of the courts under section 236(3) of the Act. Such discretion and control by the court under s. 236(3) is to be read together with s. 226(3) of the Act. This is notwithstanding the fact that the proceedings had already commenced.

**[19]** It was argued by the first plaintiff that the facts in the Federal Court case of *Winstech* can be distinguished from the Court of Appeal case in *Hup Lee Coachbuilders Holdings Sdn Bhd* wherein in *Hup Lee Coachbuilders Holdings Sdn Bhd*, the parties concerned did not seek the sanction of the official receiver despite the directive from the court to file the application for sanction so as to proceed with the case. Further *Winstech* is of higher authority than *Hup Lee Coachbuilders Holdings Sdn Bhd*, and was decided post *Hup Lee Coachbuilders Holdings Sdn Bhd*.

**[20]** The learned judge pointed out that in suit 207, the first plaintiff had applied for sanction from the official receiver on 14 May 2015 and the official receiver replied on 3 June 2015 granting the required sanction. There was some error in respect of the details of the suit which was sanctioned by the official receiver whereby it was wrongly stated that it should be Kuala Lumpur High Court instead of Shah Alam High Court. However, the learned judge did not find fault with the sanction given, as the official receiver had corrected it *vide* the official receiver's letter addressed to the plaintiff dated 7 July 2015.

**[21]** The learned judge referred to the case of *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785 which sets the fundamental principle that "once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the court to authorise other persons to conduct litigation in the name of the company".

**[22]** Although the learned judge in the application proceedings for striking out in suit 207, cited the cases as abovementioned, he failed to appreciate the facts in *Winstech*. The learned judge at the hearing of the notice of application for striking out in suit 207 ended by saying that he was of the view that this is not a plain and obvious case that warrants the striking out by the first plaintiff for want of capacity and *locus standi*.

**[23]** However, if one were to peruse the judgment in *Winstech*, the court in *Winstech* did not at all depart from *Hup Lee Coachbuilders Holdings Sdn Bhd*. The Court of Appeal in fact recapitulated what was held in *Hup Lee Coachbuilders Holdings Sdn Bhd* that "the sanction granted under s. 236(2)(a) of the Companies Act 1965 to bring, defend any action or other legal proceedings in the name or on behalf of the company does not have a retrospective effect. (refer to para. 19 of the said case)

**[24]** Further in *Winstech*, the court after perusing through the "sanction" given by the director of insolvency in its letter, found that nowhere in the letter did it mention that the sanction was to have a retrospective effect, and there was no evidence to show that there was any application for the sanction to be made retrospective. The court further stated that for the doctrine of ratification to be applicable, the ratification must be clear.

**[25]** Although the Court in *Winstech* followed *Re Saunders (A Bankrupt), Re Bearman (A Bankrupt), Re Bristol & West Building Society v. Saunder*s [1977] Ch 60; [1977] 3 All ER 992, at the same time it was of the view that, only in appropriate circumstances, which had to be proven, could retrospective leave be given under s. 236(2)(a) of the Companies Act 1965, subject to the discretion and control of the court under s. 236(3) to be read together with s. 226(3) of the same, notwithstanding that the proceedings have already commenced. That would only happen in very rare circumstances. This is evident from the opening words of Lord Lindsay J in *Re Saunders (A Bankrupt), Re Bearman (A Bankrupt)*, *Re Bristol & West Building Society v. Saunders (supra)*, where he said "given the practical inconveniences I have described the injustices that can be left without possible remedy if retrospective leave is in no case possible …".

**[26]** Thus, it is not as a matter of right that sanction is to have retrospective effect. Even in *Winstech*, at the end of it, leave *nunc pro tunc* was not granted by the court as there was no material for the court to grant such leave to the applicant.

**[27]** When the writ and the statement of claim was filed on 23 February 2011 in suit 207, there was no sanction obtained by the first plaintiff. Sanction was only obtained on 3 June 2015, post filing of the writ and statement of claim.

**[28]** We are of the view that the learned judge failed to appreciate the underlying facts in the case of *Winstech* and *Hup Lee Coachbuilders Holdings*. In *Winstech*, the underlying facts were dissimilar to the facts in our case. In *Winstech*, the liquidator initiated the suit but did not get the sanction. In the guarantee action, it was the bank (defendant) which had initiated the action. In suit 207, the liquidator must initiate the action, not the directors. Therefore, the first plaintiff cannot get leave subsequently, as the first plaintiff has no capacity to initiate the action in the first place. In *Winstech* it was the liquidator that had applied for the sanction. The liquidator did not apply for it to be retrospective. In our present case (suit 207), the official receiver should have come in to institute the action on behalf of the first plaintiff. None of the parties obtained leave from the court for contributories to institute the action in court. In the event the liquidator refused, then they could get a court order.

**[29]** Therefore, there cannot be a retrospective sanction, as the first plaintiff has no capacity to institute the action from the beginning.

**[30]** The statement of claim clearly averred that the second to fourth plaintiffs instituted the action in their capacity as directors of the first plaintiff. However, as the first plaintiff had been wound up, the second to fourth plaintiffs being directors have limited residual powers. The powers to conduct the affairs of the wound up company, including the power to institute legal proceedings is vested in the liquidator. *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* (*supra*) clearly outlined the fundamental principle that once a company is in liquidation, its assets and liabilities vest in the liquidator. It is left to the liquidator as to how to proceed with any legal proceedings. (s. 233 of the Companies act 1965 referred).

**[31]** Following thereto, the affidavits deposed by the first plaintiff in reply to the notice of application in the striking out in suit 207 are also defective, as only the liquidator has the capacity to depose the affidavit for and on behalf of the first plaintiff which had been wound up as stipulated under s. 236(2) of the Companies Act 1965.

**[32]** Further, the reliefs prayed for by the second to fourth plaintiffs were for their losses in their personal capacities. The second to fourth plaintiffs were never parties to the facility agreement and hence could not have incurred any loss or damage as averred in their statement of claim. Section 74 of the Contracts Act 1950 envisages compensation for loss or damage caused by the breach of contract entered into between parties. Such compensation is not to be given for any remote and indirect loss or damage

sustained by reason of the breach. Support for such proposition is found in *Datuk Eric Taylor v. Lim Foo Yong & Sons Realty Sdn Bhd* [1990] 1 CLJ 415; [1990] 1 CLJ (Rep) 86; [1990] 1 MLJ 168, where the court held that:

> (1) Only a party to a contract or his estate is entitled to compensation for loss or damage caused by the breach of contract under section 74(1) of the Contracts Act 1950. In this case *Datin Peggy Taylor*, as administratrix of the estate of her deceased husband, could prove and obtain compensation for the loss suffered by the deceased or his estate but not for loss suffered by her in her personal capacity.

**[33]** The second to fourth plaintiffs are seeking the prayers in the relief sought, premised upon the fact that the first plaintiff is not liable, hence they could not be made liable. They are effectively seeking to extinguish the judgment of Yaacob bin Sam J obtained in the guarantee action in the Shah Alam Court dated 30 May 2014. However, it is a fact that the said judgment is still valid and was never set aside. The guarantee action was decided after a full trial and hence any dissatisfaction on the said judgment ought to have been brought up in an appeal. Parties cannot apply before another court of co-ordinate jurisdiction to set aside or "extinguish" the said judgment, as the court was already *functus officio*, save and except on the issue of illegality or lack of jurisdiction (refer to *Badiaddin Mohd Mahiddin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1). Clearly, in this respect, the relief prayed for, by the second to fourth plaintiffs is an abuse of the court's process.

**[34]** Therefore, in view of the fact that the sanction was only obtained after the suit had been filed, the first plaintiff has no capacity to institute this suit. The sanction obtained subsequent to the filing of suit 207 cannot be made retrospective.

*Res judicata/Absolute Estoppel*

**[35]** It is the contention of the defendant that the suit herein ought to be struck out premised upon the principle of *res judicata*/absolute estoppel. It was contended that the defendant had already pursued and obtained judgment against the second to fourth plaintiffs in the guarantee action.

**[36]** The defendant submitted that the writ and the statement of claim in the guarantee action consisted of the same parties and was premised upon the same facts as suit 207. The principle of *res judicata* as stipulated in the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 applies.

**[37]** To oppose the argument by the defendant, the first plaintiff submitted that the first plaintiff was never a party to the guarantee action. In addition, the second to fourth plaintiffs submitted that they are claiming against the defendant in their capacity as directors and shareholders of the first plaintiff who were required to give guarantees to the defendant in consideration of the

granting of the banking facilities to the first plaintiff. It was submitted that the second to fourth plaintiffs have residual powers to act on behalf of the first plaintiff following the case of *Sri Hartamas Development Sdn Bhd v. MBf Finance* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436. The second to fourth plaintiffs also relied on the case of *Gleeson v. J Wippel & Co Ltd* [1977] 3 All ER 54.

**[38]** The plaintiffs further contended that the learned judge in the guarantee action did not adjudicate on the following issues which were pleaded by the second to fourth plaintiffs, ie:

(a) the unauthorised deduction of the disputed legal fee by the defendant;

(b) the failure of the defendant to pay Forest Point Sdn Bhd,

which resulted in the first plaintiff being wound up by Forest Point Sdn Bhd.

**[39]** The learned judge in suit 207 when hearing the striking out application by the defendant was not convinced that this case was obviously unsustainable due to the maxim of *res judicata*. He referred to the case of *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 at pp. 331-332 (CLJ); p. 357 (MLJ) where Gopal Sri Ram JCA quoted the case of *Henderson v. Henderson* [1843] 67 ER 313 where Wigram VC said at p. 319:

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ...
>
> Pausing for a moment, I think that it is essential to bear in mind that Wigram VC spoke these words in the Court of Chancery, and that the court he referred to was that court of which he was the Vice Chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of *res judicata* has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.
>
> Now, there is a dimension to the doctrine of *res judicata* that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case [1938] 4 All ER 747 at page 755; [1939] AC 1 at p 21). All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

The learned judge was of the view that premised on the cases cited, and in the interest of justice, the plaintiffs should be accorded the right of the opportunity to ventilate their case at a full trial, as justification for him in not striking out the case.

However, from the grounds of the learned judge, we are of the view that there has been no judicial appreciation of the facts of the guarantee action and suit 207. Our reasons are as follows.

**[40]** A perusal of the statement of claim in the guarantee action and in suit 207 disclosed that:

(i) Both consisted of the same series of facts.

(ii) The guarantee action was determined after a full trial based on its merits after witnesses gave evidence. The grounds of judgment of the Yaacob Sam J in the guarantee action disclosed that there was evidence led by PW1 in examination in chief, cross-examination and re-examination on:

  (a) The issue of RM3.3 million from Pembinaan BLT Sdn Bhd;

  (b) The issue of the legal fee of RM600,000;

  (c) Issue on the debt owing to Forest Point Sdn Bhd in the amount of RM250,000;

  (d) All the documents referred to in the guarantee action are the same as in the documents in suit 207;

(iii) The parties in the guarantee action are the same as in suit 207;

(iv) The issues and the subject matter raised in suit 207 (with regards to the issue of the amount of RM3.3 million of debt from Pembinaan BLT Sdn Bhd, the issue of the legal fee of RM600,000, the issue of the debt owed to Forest Point Sdn Bhd in the amount of RM250,000) have been raised and considered in the guarantee action (refer to pp. 341-381 of the records of appeal jilid 2(3));

**[41]** It has been established in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* (*supra*) that a matter or issue which had been adjudged and litigated, created an estoppel *per rem judicature*. The effect is that parties and their privies are not allowed to litigate again on the same matter as the judgment becomes the truth between the parties. The rationale is that it is in the public interest that there should be finality in litigation and that parties should not be vexed twice for the same causes of action. The maxim also applies to issues or causes of action which should have been raised in the original action which resulted in the final judgment. This has been aptly explained in the case of *Henderson v. Henderson* (1843) 3 Hare 100 115 which is:

> The plea of *Res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.
>
> ...
>
> In order to prevent multiplicity of actions and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such estoppel of cause has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not either deliberately or due to inadvertence.

These principles have been applied in the case of *Penang Port Commission v. Kanawagi Seperumaniam* [2009] 1 CLJ 169, *Joseph Paulus Lantip & Ors v. Unilever PLC* [2012] 7 CLJ 693, *Datuk Ooi Han Eng & Anor v. Soh Huang Siah* [2010] 1 LNS 343; [2010] 5 MLJ 665 and *Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413.

**[42]** The learned judge in suit 207 referred to the case of *Chee Pok Choy & Ors v. Scotch leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 at p. 357 where Gopal Sri Ram JCA quoted the case of *Henderson v. Henderson* [1843] 67 ER 313 wherein Wigram VC said "since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result". It was with that in mind that the learned judge refused to strike out the case and said that parties should be given the opportunity to ventilate the issues at full trial.

However, what is pertinent to note that, nowhere in the judgment of the learned judge in suit 207 did he allude to the facts which could lead to an injustice to the parties if the doctrine is applied. Neither was it shown to the court that an unjust result would occur if and when *res judicata* is applied.

**[43]** In fact, the factual matrix of suit 207 and the guarantee action provide a plain and clear case of multiplicity of actions, which is an abuse of the court's process.

*The Bankruptcy Action*

**[44]** A final subsidiary point raised by the defendant was that the present action commenced by the second to fourth plaintiffs is an abuse of process in an attempt to thwart the bankruptcy proceedings which were brought by the defendant against the plaintiffs pursuant to the guarantee action.

**[45]** The learned judge was of the view that this ought to be dealt with in the bankruptcy action. We are of the view that it need not be so.

**[46]** The second to fourth plaintiffs have commenced their action in the writ action and statement of claim in suit 207 only after the bankruptcy action was filed against them. It is to be noted that judgment in the guarantee action was obtained on 30 May 2014. The bankruptcy notice was dated 28 August 2014 and it was served on the plaintiffs on 12 February 2015. The plaintiffs filed their affidavits asserting that there existed a counterclaim against the defendant on 13 April 2015 when served with the bankruptcy notice. Subsequently, the writ and statement of claim of suit 207 was filed on 15 April 2015. Clearly, the counterclaim by the plaintiffs was filed only after the bankruptcy notice was served. The plaintiffs could/should have raised their counterclaim in the guarantee action, which they failed to do. Raising it for the first time in suit 207, and only after the bankruptcy notice was served on the plaintiffs, clearly smacks of *mala fides* and making use of the court process to justify their means to an end. The act of abuse cannot be clearer than this, ie, an attempt by the plaintiffs to delay the enforcement of the judgment of the guarantee action.

**[47]** Therefore, there is no necessity to deal with this issue in the bankruptcy action as the court would be complicit with the purpose of the plaintiffs ie, to delay the enforcement proceedings further. We are dealing with the present suit (suit 207) and there is evidence of the court process being abused by the plaintiffs. It would serve the ends of justice for the court to deal with it in the present suit.

**Conclusion**

**[48]** Based on the aforesaid, the first plaintiff lacks the capacity and the *locus standi* to institute the present action (suit 207) against the defendant. The sanction provided by the Director of Insolvency has no retrospective effect.

**[49]** Further, the present suit (suit 207) provides a clear example of a duplicity of action to the guarantee action which had been determined to its finality based on merits by a court of competent jurisdiction. The judgment of the guarantee action is still valid and has never been set aside. Hence, the filing of suit 207 attracts the maxim of *res judicata*.

**[50]** Suit 207 is frivolous and an abuse of the court's process and is therefore unsustainable and should therefore be struck out.

**[51]** We therefore allowed the appeal with costs. The writ and statement of claim is struck out.